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Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION
4 TASER INTERNATIONAL,)
5 INC., et al.,)
6)
7 Plaintiffs,)
8)
9)
10 vs.) Civil Action File
11) No.
12 MORGAN STANLEY &) 1:10-CV-03108-JOF
13 CO., INC., ET AL.)
14)
15 Defendants.)
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1	your ruling with respect to the good	10:04:24
2	faith reliance on counsel defense.	10:04:27
3	That is the subject of Roman Numeral	10:04:31
4	III in the first order we did, dated	10:04:36
5	February 7th, 2011.	10:04:39
6	Who will speak for the plaintiff's	10:04:43
7	on that subject?	10:04:45
8	MR. ROSENWASSER: Hi, Mr. Fellows,	10:04:47
9	it's Steven Rosenwasser again and I	
10	will be speaking on the subject.	10:04:51
11	Basically plaintiffs would like	10:04:54
12	clarification on your ruling relating	10:04:57
13	to the use or potential use of the good	10:04:59
14	faith reliance on counsel defense in	10:05:02
15	this case.	10:05:04
16	As you pointed out a moment ago,	10:05:06
17	there has previously been motions	10:05:08
18	practice on the issue of the	10:05:11
19	plaintiff's concern that the defendants	10:05:14
20	may be in our view improperly waiting	10:05:17
21	to state whether or not they're going	10:05:21
22	to invoke a good faith reliance on	10:05:23
23	counsel defense in this case.	10:05:26
24	And in particular, our worry was	10:05:28
25	and remains that the defense were going	10:05:32

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1	to wait until very late in discovery or	10:05:34
2	maybe even after discovery to say	10:05:38
3	whether or not they're going to rely on	10:05:41
4	that defense at which time the	10:05:42
5	plaintiffs will be prejudiced because	10:05:44
6	we wouldn't have any discovery to wit	
7	we've already completed our	
8	depositions.	10:05:47
9	In the February order you had	10:05:47
10	referenced a moment ago, the Special	10:05:50
11	Master had ruled that in the event the	10:05:55
12	defendants raised the issue later on,	10:05:57
13	one potential course or consequence may	10:06:00
14	be that discovery is reopened to allow	10:06:05
15	to engage in discovery on that defense.	10:06:08
16	And the issue we have is while we	10:06:11
17	understand that that reopening	10:06:14
18	discovery or expanding discovery may be	10:06:16
19	one potential means of handling a later	10:06:20
20	raising of the good faith reliance	10:06:24
21	defense, the case law recognizes that	10:06:27
22	there are other potential consequences	10:06:29
23	to what we would believe to be an	10:06:32
24	untimely raising of the defense.	10:06:34
25	And what has happened is we became	10:06:36

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1	concerned that the defendants were	10:06:39
2	taking your order to mean that if they	10:06:40
3	raised the defense at summary judgment	10:06:43
4	or at trial, the worst thing that would	10:06:46
5	happen is that -- to them would be that	10:06:48
6	basically the case would be delayed,	10:06:50
7	discovery would be reopened and we'd	10:06:53
8	have to start the process over again	10:06:56
9	and that they were basically not --	10:06:57
10	that they were no longer in any danger	10:07:00
11	of facing a finding that they had	10:07:03
12	waived the defense by waiting too long	10:07:08
13	no matter when they raised it.	
14	Rather than making the assumption	10:07:09
15	that that's what their position was, we	10:07:11
16	had contacted the defendant to confer	10:07:13
17	on the issue and it is my understanding	10:07:15
18	that their position is that there can	10:07:17
19	be no waiver of the defense. And that	10:07:18
20	by virtue of your ruling, the worst	10:07:22
21	thing that can happen is that discovery	10:07:25
22	reopens.	
23	So that's the issue that we wanted	10:07:28
24	clarification on and we're here today I	10:07:31
25	think to make a relatively simple	10:07:34

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1 request or at least in my view it is. 10:07:38
2 We're not asking you to reconsider your 10:07:39
3 order at this time or to say that we 10:07:41
4 get discovery to any good faith defense 10:07:45
5 or even find that there's been a waiver 10:07:45
6 but what we want to do is just make 10:07:48
7 clear that your order isn't foreclosing 10:07:50
8 any of the options that are available 10:07:53
9 under the case law in terms of what the 10:07:55
10 consequences would be if defendants 10:07:58
11 later raised a good faith reliance on 10:08:00
12 counsel defense. 10:08:03

13 By that I mean if they raised it 10:08:04
14 at some point in late discovery or 10:08:07
15 after, we can come to you or the court 10:08:09
16 and perhaps get more discovery as you 10:08:11
17 put in the order or perhaps argue that
18 waiver is appropriate and that all 10:08:14
19 those options are available as 10:08:16
20 indicated in the cases cited in our 10:08:17
21 briefs and that your order wasn't meant 10:08:22
22 to foreclose the possibility of 10:08:24
23 consequences beyond just reopening 10:08:26
24 discovery in the event that defense is 10:08:27
25 later raised.

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1	So I don't think it's valuable to	10:08:29
2	debate now what the consequences could	10:08:32
3	be and I understand the defendants may	10:08:34
4	argue that the case law doesn't say	10:08:36
5	that there could be a waiver but I want	10:08:38
6	to at least make sure that that issue	10:08:40
7	is preserved and that nobody is	10:08:42
8	operating under the assumption that	10:08:44
9	waiver is definitively off the table if	10:08:44
10	the case law permits it.	10:08:47
11	We ask today that we get	10:08:49
12	clarification in the sense that you let	10:08:52
13	the defendant know that in the event	10:08:54
14	they raise it later, the plaintiffs	10:08:57
15	have the right to seek any and all	10:08:57
16	remedies available under the law and	10:09:01
17	that the only remedy is not going to be	10:09:01
18	just extending discovery.	10:09:05
19	SPECIAL MASTER: All right. Who	10:09:06
20	would like to speak on behalf of the	10:09:08
21	defendants?	10:09:10
22	MR. PEPPERMAN: This is Rick	10:09:12
23	Pepperman for Goldman Sachs. I will	10:09:14
24	briefly. I don't know whether anyone	10:09:17
25	else has anything to add on this issue.	10:09:19

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1 I do think, however, that this is 10:09:21
2 really a nonissue. At the outset let 10:09:24
3 me state categorically at least on 10:09:29
4 behalf of my clients, that there is no 10:09:33
5 intent here at all or no plan at all 10:09:35
6 here to sandbag the plaintiffs and wait 10:09:38
7 until the eve of trial or summary 10:09:43
8 judgment briefing or some later time to 10:09:47
9 assert a defense of reliance on the 10:09:50
10 advice of counsel. 10:09:54

11 As we've said before, the 10:09:56
12 defendants have not yet asserted such a 10:09:57
13 defense and at present do not intend to 10:10:01
14 assert such a defense. You know, in 10:10:04
15 terms of clarification of Special 10:10:08
16 Master's order, you know, when Mr. 10:10:13
17 Rosenwasser raised this issue with us, 10:10:15
18 I think our only response was that from 10:10:18
19 our perspective, we thought that the 10:10:21
20 order was clear. 10:10:23

21 On page 11 it states, the defense 10:10:25
22 of reliance on advice of counsel is not 10:10:31
23 an affirmative defense and, therefore, 10:10:33
24 may be asserted at a later time with 10:10:36
25 the cites 08(c) and the relevant 10:10:38

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1	Georgia analog; however, if defendants	10:10:41
2	later elect to assert the defense of	10:10:46
3	reliance on advice of counsel in this	10:10:49
4	action, then the Special Master will	10:10:51
5	authorize plaintiff's to conduct	10:10:53
6	narrowly held discovery as to that	10:10:56
7	later asserted defense.	10:10:58
8	Our view was and is that the order	10:11:00
9	is clear and doesn't require	10:11:02
10	clarification.	10:11:03
11	SPECIAL MASTER: All right. Thank	10:11:05
12	you. Does anyone else wish to be heard	10:11:08
13	on that point?	10:11:09
14	MR. ROSENWASSER: Mr. Fellows,	10:11:15
15	Steven Rosenwasser. I think one	10:11:16
16	additional fact might be useful. We	10:11:17
17	served the interrogatories that you had	10:11:20
18	mentioned in the hearing asking the	10:11:21
19	defendants whether or not they intended	10:11:23
20	to raise a good faith reliance on	10:11:24
21	counsel defense.	10:11:28
22	And each of the defendants did	10:11:29
23	state as Mr. Pepperman indicated that	10:11:31
24	they don't currently intend on raising	10:11:31
25	it but none of them were willing to say	10:11:33

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1 in their response that they'll never 10:11:36
2 raise it. 10:11:38

3 So they continue to leave the door 10:11:38
4 open that it was a possibility later 10:11:41
5 on, which is one of the reasons we 10:11:42
6 followed up with an inquiry and for 10:11:44
7 basically the same position we've 10:11:46
8 always been in which is they say we're 10:11:46
9 not doing it now but we're reserving 10:11:48
10 the right to do it later. 10:11:51

11 SPECIAL MASTER: All right. Why 10:11:52
12 don't -- we'll take this approach. 10:11:58

13 Rather than me giving a ruling on each 10:12:00
14 point, I'd like to go through all of 10:12:05
15 these points and I may at the 10:12:07
16 conclusion of this conference try to 10:12:11
17 give you immediate rulings on certain 10:12:13
18 of these points or may say that we'll 10:12:16
19 bundle them all together in another 10:12:21
20 written order, which I would be able to 10:12:24
21 issue by Monday of next week. 10:12:27

22 I'm going to be out of the office 10:12:31
23 tomorrow and while I'll have my 10:12:32
24 computer with me, I won't be able to 10:12:36
25 work on this case tomorrow. I'll have 10:12:38

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1	and who have made voluntarily the	12:05:37
2	choice to have their records and their	12:05:39
3	information as well as their trading	12:05:41
4	kept by Mr. Scott.	12:05:43
5	It would be the same thing as if	12:05:46
6	Morgan Stanley said when asked for data	12:05:48
7	that it gets from a vendor that because	12:05:50
8	the data is at a vendor, Morgan Stanley	12:05:54
9	shouldn't have to bear the cost of	12:05:59
10	making the production.	12:06:03
11	MR. ROSENWASSER: We've given them	12:06:04
12	all the documents so I'm not sure what	12:06:05
13	they're referring to. We're talking	12:06:06
14	about the cost of Chester's personal	12:06:07
15	e-mails.	12:06:10
16	MR. WISE: Through the use of the	12:06:13
17	search terms, we are limiting that to	12:06:14
18	only the items that relate to this case	12:06:16
19	and the trading that he did for the	12:06:21
20	plaintiffs in this case.	12:06:23
21	MR. ROSENWASSER: I'm happy to	12:06:25
22	brief all this. I don't know how much	12:06:27
23	Mr. Fellows wants to hear on this.	12:06:29
24	SPECIAL MASTER: You can each do	12:06:32
25	it by e-mail or in a Word document.	12:06:33

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1	You won't be prejudiced if you choose	12:06:36
2	to do it by e-mail as to this cost	12:06:38
3	issue, too. So I'll incorporate that	12:06:42
4	into the order that I'll get out by	12:06:46
5	Monday, April 11th.	12:06:49
6	So let me tell you what I'm going	12:06:52
7	to rule upon verbally now that the	12:06:55
8	Court Reporter is recording and will	12:06:59
9	memorialize these rulings in the	12:07:05
10	written order Monday. Then I'll tell	12:07:06
11	you what I cannot rule upon yet.	12:07:08
12	First of all, with respect to item	12:07:11
13	one, clarification on our initial order	12:07:13
14	with respect to the good faith reliance	12:07:18
15	on counsel defense, I find that there	12:07:20
16	is no need to clarify or elaborate on	12:07:24
17	our initial order with respect to that	12:07:30
18	defense.	12:07:33
19	My order speaks for itself as to	12:07:35
20	what I think is the appropriate remedy	12:07:38
21	in the event that the defendants decide	12:07:41
22	to assert the defense of reliance on	12:07:45
23	counsel. So I'm not going to change my	12:07:50
24	ruling or modify it in any respect.	12:07:54
25	As to item two, a date certain for	12:07:58